In The

Supreme Court of the United States

October Term, 1970

No. 1244

H. THOMAS FOLEY AND MARY V. FOLEY,
Petitioners,

v.

COMPTROLLER OF THE TREASURY,
STATE OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENT IN OPPOSITION

Petitioners have accurately set forth the opinions below, the grounds upon which the jurisdiction of this Court is invoked, the question presented for review, the constitutional provision and statute involved and the statement of the case.

REASON FOR DENYING THE WRIT

THE PROGRESSIVE NATURE OF THE MARYLAND INCOME TAX AS APPLIED TO PETITIONERS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioners contend that Article 81, Section 288(a) of the Annotated Code of Maryland (1969 Replacement Volume) which imposes a progressive rate of tax varying from two percent (2%) to five percent (5%) on the taxable net income of individuals constitutes unequal treatment and violates the Equal Protection Clause. As basis for this contention the Petitioners cite the cases of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

The doctrine of "one man — one vote" as formulated by this Court in the state legislature reapportionment cases of *Baker v. Carr*, *supra*, and *Reynolds v. Sims*, *supra*, simply does not support Petitioners' contention that the principle of "one man — one vote" commands, by analogy, one tax rate.

The validity of a progressive or graduated income tax has long been established as being non-violative of the Equal Protection Clause. As early as 1900, this Court in *Knoulton v. Moore*, 178 U.S. 41 (1900) upheld the progressive rate feature of the Federal War Revenue Act of June 1898 which was attached on grounds of fundamental principles of equity and justice. Mr. Justice White said for the Court:

> "The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question

whether it is or is not is legislative, and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious" *supra*, pp. 109-110.

Likewise, in *Brushaber v. Union P.R. Co.*, 240 U.S. 1 (1916) the Court sustained the progressive feature of the federal income tax provisions of the Tariff Act of October 3, 1913 which was attacked as an arbitrary abuse of power wanting in due process.

In *Welch v. Henry*, 305 U.S. 134 (1938) the Court upheld the validity of an income tax enacted by the State of Wisconsin which included a retroactive graduated tax on corporate dividends. Justice Stone stated for the Supreme Court:

> "It is a commonplace that the equal protection clause does not require a state to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition." *supra*, p. 145.

Similar language as quoted above from *Welch v. Henry*, supra, can also be found in *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) at 415.

In view of the decisions cited above, Petitioners' contention that a progressive state income tax is *per se* unconstitutional under the Equal Protection Clause is without merit.

CONCLUSION

It is respectfully submitted that the statement quoted above by this Court in *Welch v. Henry*, supra, remains the standard by which a state income tax should be measured against the Equal Protection Clause. Petitioners have failed to show that their tax burden is substantial nor that it is based upon a discrimination which is arbitrary or capricious and, therefore, petition for writ of certiorari should be denied.

Respectfully submitted,

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